

**United States Department of Labor
Employees' Compensation Appeals Board**

J.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 17-0888
Issued: September 22, 2017**

Appearances:

*Linda Sanborn, for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2017 appellant, through his representative, filed a timely appeal from a September 16, 2016 nonmerit decision of the Office of Workers' Compensation Programs² (OWCP). As more than 180 days elapsed from the last merit decision, dated March 21, 2016, to

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant timely requested oral argument in this case. By order dated August 11, 2017, the Board after exercising its discretion denied his request for oral argument as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 17-0888 (issued August 11, 2017).

the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁴

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 18, 2015 appellant, then a 32-year-old city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on November 17, 2015 he sustained a lumbar strain from lifting a mail tray. He stopped work and first sought medical treatment on the date of injury. Appellant received continuation of pay for 45 days until January 1, 2017.

In support of his claim, appellant submitted Concentra medical reports dated November 17 through December 9, 2015. In a November 17, 2015 report, Dr. David Kronzek, a physician specializing in occupational medicine, reported that appellant injured his back when he was lifting a mail tote at work and developed acute pain. He noted a history of a motor vehicle accident resulting in a herniated nucleus pulposus. Dr. Kronzek diagnosed lumbar strain and history of herniated intervertebral disc.

In a December 8, 2015 diagnostic report, Dr. David Davidson, a Board-certified radiologist, reported that a magnetic resonance imaging (MRI) scan of the lumbar spine revealed moderate spinal stenosis at L4-5, bilateral neural foraminal stenosis, potential for exiting L4 nerve root impingement, central and left paracentral disc protrusion/herniation and annulus tear at L5-S1, neural foraminal narrowing bilaterally without neural foraminal stenosis, stenosis of the left lateral recess, and potential for impingement traversing the left S1 nerve root. He reported that these findings were consistent with acute injuries relative to the reported date.

In medical reports dated December 17, 2015 and January 14, 2016, Dr. Kevin Kessler, a Board-certified orthopedic surgeon, reported that appellant injured his back on November 17, 2015 while lifting at work. A December 8, 2015 lumbar spine MRI scan revealed moderate spinal stenosis at L4-5, bilateral neural foramen stenosis with L4 nerve root impingement, and left central and left paracentral disc herniation at L5-S1 potentially impinging the S1 nerve root. Appellant reported that, prior to this incident, he never had any injuries or problems with his back. Dr. Kessler diagnosed L4-5 and L5-S1 nerve impingement with herniation.

In support of his claim, appellant also submitted therapy notes dated November 17 through 25, 2015, as well as duty status reports (Form CA-17) dated November 17, 2015 through January 14, 2016.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence after OWCP rendered its September 16, 2016 decision. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered on appeal by the Board. 20 C.F.R. §501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

By letter dated February 17, 2016, OWCP notified appellant that his claim was initially administratively handled to allow medical payments, as it appeared to involve a minor injury resulting in minimal or no lost time from work. However, the merits of appellant's claim had not been formally considered and his claim had been reopened for consideration of the merits because the medical bills had exceeded \$1,500.00. OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. Appellant was advised of the medical and factual evidence needed and afforded 30 days to submit the additional evidence.

In a February 11, 2016 medical report, Dr. Kessler diagnosed L4-5 and L5-S1 nerve impingement with herniation. In a February 25, 2016 medical report, he noted review of a prior August 2, 2013 MRI scan which showed an extruded herniated disc and spinal stenosis at L4-5 with disc bulging at L5-S1. Dr. Kessler noted that appellant's new December 8, 2015 MRI scan showed a central and left-sided disc herniation at L5-S1, which had progressed since his old MRI scan. He diagnosed L4-5, L5-S1 nerve herniation.

By decision dated March 21, 2016, OWCP denied appellant's claim finding that the medical evidence of record failed to establish that his diagnosed lumbar condition was causally related to the accepted November 17, 2015 employment incident.

On an appeal request form dated March 22, 2016, postmarked April 22, 2016, and received on May 5, 2016, appellant requested a review of the written record before an OWCP hearing representative. In an accompanying narrative statement, he requested reconsideration and reported that he had been working full time as a city carrier assistant for over a year, but did not injure his back until November 17, 2015 when he lifted a tub of magazines. Appellant argued that his back injury correlated with the results of his MRI scan. He submitted a September 27, 2011 diagnostic report from Dr. Bruce Rodan, a Board-certified radiologist, who noted severe back pain post motor vehicle accident. Dr. Rodan reported that the lumbar spine MRI scan revealed extruded herniated disc with spinal stenosis and bilateral foraminal encroachment, L4-5 level bulging disc, and L5-S1 level.

By decision dated May 20, 2016, an OWCP hearing representative denied appellant's request for review of the written record finding that his request was not made within 30 days of the March 21, 2016 decision. The hearing representative further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which established that he sustained an injury causally related to the accepted November 17, 2015 employment incident.

On September 12, 2016 appellant requested reconsideration. He related that the employing establishment sent him to Concentra for treatment and it was their responsibility to make sure Concentra provided him detailed medical documentation. In support of his claim, appellant noted submission of an attending physician's report (Form CA-20) where his physician checked the box marked "yes" when asked if the injury was caused or aggravated by the employment activity.⁵

⁵ The record before the Board did not contain a Form CA-20 as noted by appellant.

In support of his claim, appellant resubmitted Dr. Kessler's January 14, and February 11 and 25, 2016 medical reports, as well as the December 8, 2015 lumbar spine MRI scan.

By letter dated March 29, 2016, appellant indicated that he submitted all medical documentation in support of his claim and that the employing establishment was responsible for providing the required treatment notes establishing his claim since he was seen at an employing establishment medical facility.

By decision dated September 16, 2016, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁶ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).⁸

In his September 12, 2016 application for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. In addition, he did not advance a new and relevant legal argument. Appellant argued that it was the employing establishment's responsibility to submit medical documentation establishing his claim. However, this argument has no reasonable color of validity as an employee who claims benefits under FECA has the burden of proof to establish the essential elements of his claim.⁹

The underlying issue in this case was whether appellant sustained a lumbar injury causally related to the accepted November 17, 2015 employment incident. That is a medical

⁶ *D.K.*, 59 ECAB 141 (2007).

⁷ *K.H.*, 59 ECAB 495 (2008).

⁸ *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

⁹ *Michael E. Smith*, 50 ECAB 313 (1999).

issue which must be addressed by pertinent and relevant medical evidence.¹⁰ Appellant, however, failed to submit relevant and pertinent new medical evidence in support of his claim.

With his reconsideration request, appellant resubmitted Dr. Kessler's January 14 and February 11 and 25, 2016 medical reports, as well as the December 8, 2015 lumbar spine MRI scan. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.¹¹ The medical evidence not previously reviewed was Dr. Rodan's September 27, 2011 lumbar MRI scan diagnostic report. While this evidence was new, it merely interpreted imaging studies and failed to address the relevant issue in this claim by providing an opinion regarding the cause of appellant's injury. As such, the report is insufficient to warrant merit review.¹²

A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence. In this case, appellant failed to submit relevant and pertinent new medical evidence addressing causal relationship.¹³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹² *M.C.*, Docket No. 14-0021 (issued March 11, 2014); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

¹³ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board